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In the Supreme Court of the United States

OCTOBER TERM, 1987

MANUFACTURERS ASSOCIATION OF TRI-COUNTY, ET AL.,
PETITIONERS

v.

JAMES W. KNEPPER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.*, and the Occupational Safety and Health Administration's "Hazard Communication" standard, 29 C.F.R. 1910.1200, preempt provisions of the Pennsylvania Worker and Community Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987), that regulate the evaluation and communication of workplace chemical hazards for the benefit of both employees and the general public.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Alessi v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) 14
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 11, 12
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 843 (1984) 12
City of Chicago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958) 10
Fidelity Federal Savings & Loan Ass'n v. *De La Cuesta*, 458 U.S. 141 (1982) 10, 11, 12
Fort Halifax Packing Co. v. *Coyne*, No. 86-341 (June 1, 1987) 14
Hillsborough County v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1982) 10-11
ICC v. *Texas*, No. 85-1222 (Jan. 20, 1987) 10
International Paper Co. v. *Ouellette*, No. 85-1233 (Jan. 21, 1987) 10
Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 10
Louisiana Public Service Commission v. *FCC*, No. 84-871 (May 27, 1986) 10
Metropolitan Life Insurance Co. v. *Massachusetts*, 471 U.S. 724 (1985) 10, 14
Michigan Canners & Freezers Ass'n v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984) 10
New Jersey State Chamber of Commerce v. *Hughey*, 774 F.2d 587 (3d Cir. 1985) 7, 11, 15
Ohio Mfrs. Ass'n v. *City of Akron*, 801 F.2d 824 (6th Cir. 1986), appeal pending, No. 86-1242 11
Pilot Life Insurance Co. v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987) 10, 14

Cases—Continued: Page

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 10
Rose v. *Arkansas State Police*, No. 85-1388 (Nov. 3, 1986) 10
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 10, 14
United States v. *Shimer*, 367 U.S. 374 (1961) 10, 11, 12
United Steelworkers of America v. *Auchter*, 763 F.2d 728 (3d Cir. 1985) 5, 11
United Steelworkers of America v. *Pendergrass*, 819 F.2d 1263 (3d Cir. 1987) 5

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) 9
Art. VI, Cl. 2 (Supremacy Clause) 10
Amend. V (Takings Clause) 9
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 14
Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.* ..... *passim*
§ 2(b), 29 U.S.C. 651(b) 2
§ 2(b)(3), 29 U.S.C. 651(b)(3) 2
§ 2(b)(11), 29 U.S.C. 651(b)(11) 2
§ 3(8), 29 U.S.C. 652(8) 3
§ 6, 29 U.S.C. 655 2
§ 18, 29 U.S.C. 667 ..... 6, 7
§ 18(a), 29 U.S.C. 667(a) 2-3
§ 18(b), 29 U.S.C. 667(b) 3, 11
§ 18(c)(2), 29 U.S.C. 667(c)(2) 3, 12
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Tit. III, 100 Stat. 1728-1758 ..... 16, 17, 18
§ 301, 100 Stat. 1729-1730 16
§ 302, 100 Stat. 1730-1731 16
§§ 303-305, 100 Stat. 1731-1736 16
§ 311, 100 Stat. 1736 16
§§ 311-313, 100 Stat. 1736-1747 16
§ 312, 100 Stat. 1738-1741 17

Statutes and regulations—Continued: Page

§ 313, 100 Stat. 1741-1747 17
§ 322, 100 Stat. 1747-1750 17
§ 323, 100 Stat. 1750-1752 17
§ 324, 100 Stat. 1752 17

Worker and Community Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987) 1-2, 5, 6, 9, 12, 15

§ 7301 note (preamble) 5, 12
§ 7303(a) 6
§ 7303(e) 6, 7
§ 7303(f) 6, 7
§ 7303(g) 6
§ 7303(i) 7
§ 7303(j) 7
§ 7304 6
§ 7304(a) 7
§ 7304(b) 7
§ 7304(c) 6, 7
§ 7304(d) 7
§ 7304(e) 7
§ 7304(f) 7
§ 7304(g) 7
§ 7306 7
§ 7306(a) 6
§ 7308 ..... 6, 7-8
§ 7310(a) 8
§ 7319(b) 6
§ 7319(d) 7
§ 7320 7

29 C.F.R.:

Pt. 1902 ..... 3, 15
Section 1902.1 3
Pt. 1910 3
Section 1910.4(a) 3
Section 1910.1200 1
Section 1910.1200(a) 4
Section 1910.1200(a)(2) 5, 11, 13

Regulations—Continued: Page

Section 1910.1200(b) 4
Section 1910.1200(d) 4
App. A 4
App. B 4
Section 1910.1200(e) 4
Section 1910.1200(f) 4
Section 1910.1200(g) 4
Section 1910.1200(h) 4
Pt. 1952 15-16

Miscellaneous:
48 Fed. Reg. (1983):
p. 53280 3
p. 53281 5
p. 53284 5
pp. 53322-53323 ..... 5, 11
p. 53334 5
52 Fed. Reg. (1987):
p. 2836 16
p. 31852 ..... 5, 15
H.R. Rep. 99-253, 99th Cong., 1st Sess. (1985) 16, 17

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

The Occupational Safety and Health Act of 1970, 29 U.S.C. (& Supp. III) 651 *et seq.* (OSH Act), authorizes the Department of Labor to regulate occupational exposure to hazardous chemicals. The Department's Occupational Safety and Health Administration (OSHA) has exercised that authority through the promulgation of a "Hazard Communication" standard governing the evaluation of workplace chemical hazards and communication of information about those hazards to employees in the manufacturing sector of the national economy. 29 C.F.R. 1910.1200. Pennsylvania has enacted a similar—but broader—statute, entitled the Worker and Community

Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987), that regulates the evaluation and communication of information about chemical hazards to employees in all sectors of the economy and to the general public.

Petitioner Manufacturers Association of Tri-County and allied organizations initiated this suit to prevent enforcement of the Pennsylvania statute, arguing, among other grounds, that the federal Hazard Communication standard preempts the state statute. The district court concluded that federal law preempts the state law "to the extent [that the state law] requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards" (Pet. App. C3). The court of appeals affirmed in part and reversed in part, concluding that the district court had properly found no preemption outside the manufacturing sector, but had erred in determining which aspects of the Pennsylvania law applicable to the manufacturing sector are preempted (*id.* at A8).

1. Congress enacted the OSH Act "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (§ 2(b), 29 U.S.C. 651(b)). The Act effectuates this goal through a program of cooperative federalism that includes "authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (§ 2(b)(3), 29 U.S.C. 651(b)(3)), while "encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" (§ 2(b)(11), 29 U.S.C. 651(b)(11)).

Section 6 of the OSH Act specifically authorizes the Secretary to establish federal occupational safety and health standards and sets forth detailed procedures for promulgating those standards (29 U.S.C. 655).[1] Section

[1] "The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

18(a) of the Act makes clear, however, that a state may continue to assert "jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect" (29 U.S.C. 667(a)). Section 18(b) further provides (29 U.S.C. 667(b)):

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under [Section 6] shall submit a State plan for the development of such standards and their enforcement.

Section 18(c) specifies that the Secretary shall approve a state plan if, in his judgment, it meets various conditions. Among those conditions, the resulting state safety and health standards must be "at least as effective" as the existing federal standards in providing safe and healthful employment and places of employment (§ 18(c)(2), 29 U.S.C. 667(c)(2)). Furthermore, the state standards, when applicable to products used or distributed in interstate commerce, must be "required by compelling local conditions" and must "not unduly burden interstate commerce" (*ibid.*).

The Secretary has delegated to OSHA the authority to establish occupational safety and health standards and to approve state plans. 29 C.F.R. 1902.1, 1910.4(a). OSHA, in turn, has promulgated a number of federal standards and has set out detailed regulations governing the development, submission, and approval of state plans. See 29 C.F.R. Pts. 1902, 1910.

2. On November 25, 1983, OSHA promulgated a final rule establishing a federal "Hazard Communication" standard. 29 C.F.R. 1910.1200. See 48 Fed. Reg. 53280 (1983). This standard, which was established after exten-

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reasonably necessary or appropriate to provide safe or healthful employment and places of employment." § 3(8), 29 U.S.C. 652(8).

sive study, public comment, and review, is intended to "ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector" of the national economy (29 C.F.R. 1910.1200(a)).[2] The standard basically requires chemical manufacturers and importers to assess the hazards of their products, chemical distributors to provide this information through labeling and "material safety data sheets" (MSDSs) to other manufacturers who purchase the products, and manufacturing employers to transmit the information to their employees through "comprehensive hazard communication programs" (*ibid.*).[3]

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[2] The Hazard Communication standard relies on the Office of Management and Budget's Standard Industrial Classifications (Codes 20 through 39) to determine whether an employer is within the "manufacturing sector" of the economy. See 29 C.F.R. 1910.1200(b).

[3] The Hazard Communication standard requires the chemical manufacturer or importer to evaluate the hazards of his products in accordance with detailed criteria. See 29 C.F.R. 1910.1200(d) and Apps. A & B. He (or his distributor) must then ensure that each container of hazardous chemicals leaving the workplace is labeled with specified information. See 29 C.F.R. 1910.1200(f). The chemical manufacturer or importer must also develop an MSDS containing prescribed health and safety information. See 29 C.F.R. 1910.1200(g). He (or his distributor) must then ensure that the MSDS is provided to all manufacturers who purchase hazardous chemicals. *Ibid.*

The Hazard Communication standard further requires that the manufacturing employer develop a written hazard communication program for his workplace. See 29 C.F.R. 1910.1200(e). This program must list the hazardous chemicals found in the workplace and must specify, in accordance with prescribed criteria, the methods the employer will use to inform employees of the associated hazards. The employer is required to "provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area" (29 C.F.R.1910.1200(h)).

OSHA expressly provided in the Hazard Communication standard that it preempts state laws "pertaining" to the evaluation and communication of chemical hazards to manufacturing employees. The standard expressly states (29 C.F.R. 1910.1200(a)(2)):

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of [the OSH Act], which deals with state jurisdiction and state plans.

See 48 Fed. Reg. 53281, 53284, 53322-53323, 53334 (1983).

The United States Court of Appeals for the Third Circuit has since affirmed the validity of OSHA's Hazard Communication standard. See *United Steelworkers of America* v. *Auchter*, 763 F.2d 728 (1985).[4]

3. On October 5, 1984, Pennsylvania enacted its Worker and Community Right-to-Know Act, Pa. Stat. Ann. tit. 35, § 7301 *et seq.* (Purdon Supp. 1987). As the title suggests, the Pennsylvania statute is designed to provide employees and the surrounding community with information concerning hazardous chemicals stored and used in the workplace (*id.* § 7301 note (preamble)). The Pennsylvania statute is, in many respects, similar to OSHA's Hazard Communication standard. It requires employers to survey workplace chemical hazards (*id.*

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[4] The court of appeals also directed OSHA to consider whether the standard should be extended to employees in the non-manufacturing sectors of the economy. 763 F.2d at 736, 743. On August 24, 1987, following further court order (*United Steelworkers of America* v. *Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987)), OSHA issued a revised Hazard Communication standard, to become fully effective on May 23, 1988. See 52 Fed. Reg. 31852 (1987) (certain requirements shall be effective on Sept. 23, 1987). See discussion at pages 15-16, *infra*.

§ 7303(e)); it requires chemical manufacturers, importers, and distributors to label containers and provide MSDSs (*id.* § 7304); and it requires employers to institute employee information and training programs (*id.* § 7308).

The Pennsylvania statute also differs from the OSHA standard in a number of significant respects. For example, the state statute instructs a state agency to compile a list of hazardous chemicals, rather than relying on the chemical manufacturing industry to identify hazardous substances (Pa. Stat. Ann. tit. 35, § 7303(a) (Purdon Supp. 1987)). Furthermore, the state statute, unlike the OSHA standard, applies to both manufacturing and nonmanufacturing employers (*id.* § 7303(e)). It requires an employer to provide hazard information to the general public and to local police and fire departments (*id.* at § 7303(e) and (f)), and, upon request, to conduct an environmental hazard survey (*id.* § 7303(g)). The Pennsylvania statute also differs from the OSHA standard in a number of its specific requirements. In particular, it requires chemical manufacturers to provide labeling and MSDS information that is not required by the OSHA standard, such as more detailed ingredient information for chemical mixtures (*id.* §§ 7304(c), 7306(a)).

Pennsylvania has not submitted its Worker and Community Right-to-Know Act to OSHA for review under Section 18 of the OSH Act. The Pennsylvania statute does provide, however, that the state law "is to be read in conjunction with any provision of Federal law providing for the identification, labeling, or providing of information concerning hazardous substances and is intended to supplement such Federal regulation in the interests of protecting the health and safety of citizens of the Commonwealth." Pa. Stat. Ann. tit. 35, § 7319(b) (Purdon Supp. 1987). The statute further states that the state legislature intends to reexamine the legislation in the event that a court's application of federal preemption

principles "result[s] in lessening the burden on any employer" (*id.* § 7319(d)). The statute also provides that if any provisions of the act are determined to be invalid, the provisions shall be severable (*id.* § 7320).

4. Petitioners brought a suit in the United States District Court for the Middle District of Pennsylvania challenging the constitutionality of the Pennsylvania Right-to-Know Act. They argued, among other contentions, that Section 18 of the OSH Act and OSHA's Hazard Communication standard preempt the state law (Pet. App. C2). The district court, citing the Third Circuit's decision in *New Jersey State Chamber of Commerce* v. *Hughey*, 774 F.2d 587 (1985), concluded (Pet. App. C3):

> [T]he Right to Know Act is entirely preempted by federal law to the extent it requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards. The Right to Know Act is not preempted as it applies to employers in the non-manufacturing sector, nor as it requires all employers to disclose information relating to environmental hazards, except for the labeling requirement in the manufacturing sector.

The district court elaborated on this holding with respect to each of the relevant provisions of the Pennsylvania statute (*id.* at C7-C17). It determined that subsections 7303(e), (f), (i), and (j) are preempted to the extent that they require manufacturing employers to complete hazardous substance survey forms (Pet. App. C11-C12). The court also concluded that subsection 7304(a) and Section 7306 are preempted to the extent that they require chemical suppliers to label containers shipped to manufacturing customers or that they require manufacturing employers to label containers in their workplace (*id.* at C13-C15). It next held that subsections 7304(b), (c), (d), (e), (f), and (g) are preempted to the extent that they require that a chemical supplier must provide a Pennsylvania MSDS when shipping chemicals that present only workplace hazards to manufacturing customers (Pet. App. C15-C16). Finally, the court determined that Sec-

tion 7308 is preempted to the extent that it requires manufacturing employers to conduct employee training programs and that subsection 7310(a) is preempted to the extent that it requires the Pennsylvania Department of Labor and Industry to conduct outreach programs to educate manufacturing employees concerning workplace safety (Pet. App. C16-C17).[5]

The court of appeals affirmed in part and reversed in part, stating (Pet. App. A8):

> We hold that the district court * * * correctly ruled that there was no OSH Act preemption outside the manufacturing sector, that the education and training requirement was preempted as to employees in the manufacturing sector, and that the Department Outreach program was preempted in that sector. We also hold that the district court erred in holding the hazard survey, labeling, and MSDS requirements totally preempted in the manufacturing sector.

The court of appeals stated that the OSH Act and the OSHA's Hazard Communication standard do not expressly preempt a state law unless the law has "as its primary purpose the promotion of occupational health and safety through hazard communication" (Pet. App. A16).

The court concluded that manufacturing employers must comply with the state statute's hazardous substance survey requirements because the completed survey not only provides hazard information to employees, it also contributes to community awareness of chemical hazards (Pet. App. A16-A17). The court further concluded that chemical manufacturers must comply with the state statute's labeling requirements because the completed labels, in addition to providing hazard warnings to employees, "facilitate" an employer's compliance with the

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[5] The court also concluded that the preempted provisions were severable and that the statute "does not violate the Commerce Clause or constitute a taking without just compensation" (Pet. App. C3). See *id.* at C17-C20.

hazardous substance surveys (*id.* at A18). The court reached the same conclusion with respect to most of the state statute's MSDS requirements (*id.* at A23-A24). The court further concluded that the OSH Act and the Hazard Communication standard do not preempt the hazardous substance survey, labeling, and MSDS requirements by implication (*id.* at A17, A20, A23-A24).[6]

DISCUSSION

Congress has authorized OSHA to establish federal occupational safety and health standards and has further provided that once OSHA addresses an occupational safety and health issue, a state must obtain federal approval before imposing occupational safety and health regulations "relating to" that issue (OSH Act § 18(b), 29 U.S.C. 667(b)). OSHA has comprehensively addressed the question of workplace chemical hazard communication in the manufacturing sector and has further stated that, absent federal approval, state laws "pertaining to" that issue are preempted (29 C.F.R. 1910.1200 (a)(2)). The OSH Act and OSHA's associated regulations therefore preempt the Pennsylvania's Worker and Community Right-to-Know Act's provisions specifying hazardous substance survey, labeling, and MSDS requirements, which have, as their primary purpose or effect, the regulation of communication of hazard information to manufacturing employees.

We submit that the court of appeals' decision is accordingly incorrect. We believe, however, that the question presented here does not presently warrant this Court's review. The court's decision is troublesome and will undoubtedly cause some confusion, but it should not have dire consequences. Federal and state laws concerning hazard communication are presently in a state of flux in light of recent statutory and regulatory developments.

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[6] The court of appeals affirmed the district court's rejection of petitioner's Commerce Clause and Takings Clause challenges (Pet. App. A26-A27).

These changes should help clarify and refine the respective roles of the federal and state governments. In the event that they do not, there will be future opportunities for other courts to address the question presented here and for the Third Circuit to reconsider its views. This Court should therefore await further developments before intervening in this complex and developing area of the law.

1. The Supremacy Clause authorizes Congress to enact laws that preempt otherwise valid state legislation. U.S. Const. Art. VI, Cl. 2.[7] As this Court has said repeatedly, the question whether Congress has exercised that power in any given case depends on "Congress's intent in enacting the federal statute at issue." *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 738 (1985) (quotation marks and citations omitted). "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Ibid.* (quotation marks and citations omitted). "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation." *Louisiana Public Service Commission* v. *FCC*, No. 84-871 (May 27, 1986), slip op. 12.[8]

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[7] See, *e.g.*, *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987); *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987); *Rose* v. *Arkansas State Police*, No. 85-1388 (Nov. 3, 1986); *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985); *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461 (1984); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *United States* v. *Shimer*, 367 U.S. 374 (1961); *City of Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958); *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218 (1947).

[8] See also, *e.g.*, *ICC* v. *Texas*, No. 85-1222 (Jan. 20, 1987), slip op. 2; *Hillsborough County* v. *Automated Medical Laboratories, Inc.*,

a. We believe that Congress's intent in this case is reasonably clear. Section 18(b) of the OSH Act provides that any state desiring to develop and enforce state occupational health and safety standards "relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated" must submit a state plan for federal review. 29 U.S.C. 667(b). This provision unequivocally indicates that once OSHA issues a federal occupational safety and health standard, any state desiring to regulate the same subject matter must seek federal approval by submitting a "State plan for the development of such standards and their enforcement" (*ibid.*).

Congress, no doubt expecting that the states would comply with Section 18(b)'s submission requirements, did not explicitly specify the consequences of a state's failure to participate in the federal review process. But the consequences are inescapable: a federal standard preempts state regulations that "relat[e] to" its subject matter but have not received federal approval. *Auchter*, 763 F.2d at 736; see also *Ohio Mfrs. Ass'n* v. *City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986), appeal pending, No. 86-1242; *Hughey*, 774 F.2d at 592-593. Further, OSHA's Hazard Communication standard expressly preempts any unapproved state law "pertaining to" the evaluation and communication of chemical hazards in the manufacturing sector. 29 C.F.R. 1910.1200 (a)(2). The standard's preemption provision is fully consistent with the language, purpose, and structure of the OSH Act.[9] And OSHA's regulatory interpretation is,

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471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961).

[9] The OSH Act's phrase "relating to" and the phrase "pertaining to," which appears in the standard itself, are, in this context, synonymous. As OSHA has explained, the Hazard Communication standard's express preemption provision is designed to effectuate

of course, entitled to deference from the courts.[10]

b. The crucial question in this case is the *scope* of federal preemption. Pennsylvania's Worker and Community Right-to-Know Act contains provisions that specify practices, means, and methods for the communication of chemical hazards and that are plainly intended, among other purposes, to regulate the communication of workplace hazards to manufacturing employees.[11] All of the parties agree that the OSH Act and the OSHA Hazard Communication standard preempt at least some of these provisions. See Pet. App. C2-C3.

The courts below correctly recognized that the Pennsylvania statute is severable and that, as a general matter, federal law should preempt no more than what is required to satisfy congressional objectives. They correctly held that OSHA's Hazard Communication standard does not preempt the provisions of Pennsylvania law

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Congress's goal of ensuring that once a federal occupational standard is formulated, the uniform federal standard may be displaced only by a state plan that includes standards which are "at least as effective" as the federal standards and, in the case of goods distributed in interstate commerce, are "required by compelling local conditions," and do not "unduly burden interstate commerce" (OSH Act § 18(c)(2), 29 U.S.C. 667(c)(2)). See 48 Fed. Reg. 53322-53323 (1983). Indeed, the OSH Act's elaborate federal approval standards would be meaningless if state regulations relating to the subject of an OSHA standard had equal validity whether or not they had received federal approval.

[10] See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 381-383 (1961). See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

[11] The Pennsylvania statute imposes obligations on both manufacturing and nonmanufacturing employers "to make available to employees * * * the identity of chemicals used in the workplace, and to make information available as to the known or suspected health hazards posed by the use of or exposure to hazardous substances." Pa. Stat. Ann. tit. 35, § 7301 note (preamble) (Purdon Supp. 1987). See generally pages 5-7, *supra*.

directed solely to communication of chemical hazards to nonmanufacturing employees and the general public. Significantly, they also correctly held that the Hazard Communication standard does preempt the provisions of the Pennsylvania law directed solely to communication of chemical hazards to employees within the manufacturing sector. But we believe the court of appeals erred in further concluding that the Hazard Communication standard does not preempt application of state law provisions—such as the Pennsylvania statute's hazardous substance survey, labeling, and MSDS requirements—that are designed to communicate hazard information to *both* manufacturing employees and other persons. The court of appeals claimed to preempt only those provisions that have as their "primary purpose the promotion of occupational health and safety" (Pet. App. A16). In its application of that test, however, it effectively ruled that chemical manufacturers and manufacturing employers must comply with any state law provision that facilitates both occupational and nonoccupational objectives. We believe that this holding is incorrect.

As we have explained, OSHA's Hazard Communication standard preempts application of the state statute's provisions "pertaining to" communication of workplace hazards in the manufacturing sector. 29 C.F.R. 1910.1200 (a)(2). As OSHA construes its own standard, it preempts any state law provision that, in primary purpose *or* effect, regulates the evaluation and communication of occupational chemical hazards in the manufacturing sector. OSHA further believes that Pennsylvania's hazard survey, labeling, and MSDS requirements primarily address or affect workplace hazard communication and thus "pertain[] to" the subject of federal regulation, as the district court below found. OSHA accordingly disagrees with the court of appeals' "primary purpose" formulation to the extent that it holds that the "primary" objective of a state provision was nonoccupational simply because

it served a purpose in addition to occupational safety or health.[12]

2. Although we submit that the court of appeals erred, we do not believe that the case warrants this Court's review. The decision below will undoubtedly cause some confusion concerning the controlling legal standards for federal preemption of state right-to-know statutes and may impose additional burdens on chemical manufacturers and manufacturing employers. But we believe, on balance, that the case will not have great significance and that, for several reasons, this Court's consideration of the issue can profitably be postponed.

We are not convinced that the court of appeals' decision will have important precedential effect. At present, a number of states have enacted right-to-know statutes without seeking federal approval. Amicus Br. 14 & n.30. With the exception of New Jersey's, however, none of these statutes has been challenged on preemption

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[12] There is no occasion here to define further the contours of federal preemption under OSHA's Hazard Communication standard, or for that matter, to address the scope of any "implied preemption" that might exist under the OSH Act. For present purposes, it is sufficient simply to recognize that OSHA's standard expressly preempts application, in the manufacturing sector, of state law provisions that, as their primary purpose or effect, regulate workplace hazard communication. Petitioners (Pet. 14-15) and their amici (Br. 17) suggest that further guidance concerning the preemptive effect of the OSH Act and the OSHA standard can be gleaned from decisions of this Court interpreting the preemption provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (ERISA). See *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987) slip op. 6 (quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985), and *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). See also *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987). *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). We do not agree with petitioner (Pet. 14-15) or their amici (Br. 17) that those cases necessarily provide reliable guidance in the OSHA preemption inquiry, and for the reasons set forth below, see pages 14-18, *infra*, do not believe that this is an appropriate case for this Court to explore this issue.

grounds.[13] Moreover, even if other courts are faced with the preemption issue and agree with the court of appeals' analysis, it is not at all clear that they would apply that analysis in a manner incompatible with the OSH Act, such is the indeterminate character of the "primary purpose" test enunciated by the court below.

Moreover, what significance the decision might otherwise have has been minimized by subsequent events. On August 24, 1987, pursuant to court order (see note 4, *supra*), OSHA took action that will extend its Hazard Communication standard to the nonmanufacturing sectors of the economy. See 52 Fed. Reg. 31852 (1987). This extension, which becomes fully effective on May 23, 1988, will substantially alter the scope of federal preemption in this area and may leave little room for states to regulate *any* occupational hazard communication without obtaining OSHA approval. The regulatory revision probably will not moot the precise question presented here—whether the federal standard preempts a state law provision that provides both occupational and nonoccupational hazard information. But it is likely to diminish substantially the importance of state right-to-know statutes in the workplace and might cause those states that have not achieved, and do not intend to seek, "state plan" status under the OSH Act (see 29 C.F.R. Pts. 1902

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[13] In *Hughey*, the Third Circuit ruled that OSHA's Hazard Communication standard preempts the New Jersey Worker and Community Right to Know Act within the manufacturing sector to the extent that the state statute regulates the communication of workplace, as distinct from environmental, hazards. See 774 F.2d at 592-596. The court first articulated its "primary purpose" test in that case. It ruled that a provision requiring manufacturers to complete workplace hazard surveys and provide them to local officials is preempted because the provision's "primary purpose" is the promotion of occupational safety and health. 774 F.2d at 595. We think that *Hughey*'s holding cannot easily be squared with the court's ruling in this case. Thus, the Third Circuit's approach to OSH Act preemption does not appear totally settled and might be clarified in future cases.

and 1952) to limit their right-to-know activities exclusively to the nonoccupational sphere.

In addition, Congress has recently enacted legislation specifically addressing the states' authority to enact nonoccupational right-to-know statutes. See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, Tit. III, 100 Stat. 1728-1758 (Title III). See also 52 Fed. Reg. 2836 (1987) (proposed regulations). This far-reaching legislation (which was enacted shortly after the court of appeals' decision in this case) significantly changes the entire legal landscape underlying state right-to-know laws. Title III, captioned "Emergency Planning and Community Right-to-Know" (100 Stat. 1728), creates a comprehensive federal framework concerning state nonoccupational hazard communication programs. See H.R. Rep. 99-253, 99th Cong., 1st Sess. 59 (1985). The statute basically requires each state to establish an emergency response commission and local planning districts and committees (§ 301, 100 Stat. 1729-1730). These organizations are responsible for the development of an emergency response plan to be followed in the event that facilities storing and handling "extremely hazardous substances" (§ 302, 100 Stat. 1730-1731) release those substances into the surrounding environment. See §§ 303-305, 100 Stat. 1731-1736.

Title III requires covered facilities to provide the Environmental Protection Agency (EPA) and various state and local agencies with extensive information concerning other potential chemical hazards. See §§ 311-313, 100 Stat. 1736-1747. These reporting provisions build, in large part, on OSHA's Hazard Communication standard.[14] Furthermore, Title III expressly states that its

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[14] Section 311 provides that each owner or operator of a facility that is required by the OSH Act and regulations promulgated thereunder to prepare or have available an MSDS for a hazardous chemical, must submit that form or a list of such chemicals to the state's emergency response commission, the local emergency planning agency, and the local fire department (§ 311, 100 Stat. 1736). Title III also requires those same owners and operators to

provisions shall not preempt or affect state laws, subject to a single exception: state laws enacted after August 1, 1985, that require submission of an MSDS "shall require that the data sheet be identical in content and format" to the federally required form, subject to a counter-exception that states may require supplemental information "through additional sheets attached to the data sheet" or through another appropriate method. § 321, 100 Stat. 1747.

Thus, Title III sets forth certain basic requirements for hazard communication in the nonoccupational setting and reaffirms the states' powers to impose additional nonoccupational requirements. Title III does not moot the present controversy but—as in the case of OSHA's Hazard Communication standard revisions—it is likely to prompt states to reexamine their right-to-know laws with an eye toward establishing federal-state harmony in the area. Indeed, the House Energy and Commerce Committee expressed its "hope that even where there is some discretion, States and localities will follow the Federal program closely." H.R. Rep. 99-253, *supra*, at 115.[15]

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prepare and submit hazardous chemical inventories, detailing the amount of hazardous chemicals at the facilities (§ 312, 100 Stat. 1738-1741) and toxic chemical release reports detailing releases of toxic substances (§ 313, 100 Stat. 1741-1747). The statute provides limited trade secret protection (§ 322, 100 Stat. 1747-1750), but otherwise makes the reported information available to health care professionals (§ 323, 100 Stat. 1750-1752) and the public (§ 324, 100 Stat. 1752).

[15] The committee further stated (H.R. Rep. 99-253, *supra*, at 115):

> Because a great deal of the hazardous chemicals covered by this title will be traveling in interstate commerce, it makes sense that the Federal law should control in this area.
>
> * * * It is the intent of the Committee that such additional [MSDS] requirements be reasonable and concise. It would be most unfortunate if the public's ability to learn about hazardous chemicals in its midst would become impaired because of a plethora of inconsistent, impractical state and local requirements.

We are hopeful that Pennsylvania (and other similarly situated states) will reconsider their legislation in light of the clear dictates of the OSH Act, the much-expanded OSHA standard, and the newly enacted Title III. Federal law leaves no doubt that the states can pursue their occupational hazard communication objectives through a federally approved workplace hazard communication program. And the states can pursue their nonoccupational hazard communication objectives, subject to modest federal constraints, provided that they do not enact statutory provisions that impermissibly commingle occupational and non-occupational objectives. Thus, we believe that this Court should withhold action until the states themselves have had an opportunity to act. In the event that the dispute here persists, there will be ample opportunity for the courts to reexamine the issue and for the Third Circuit to reconsider its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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